

D.T.E. 99-DS-1

Adjudicatory hearing in the matter of a possible violation of G.L. c. 82, § 40 by Boston Gas Company

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FOR: BOSTON GAS COMPANY
Respondent

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FOR: PIPELINE SAFETY AND ENGINEERING DIVISION

I. INTRODUCTION

On May 20, 1999, the Division of Pipeline Safety and Engineering ("Division") of the Department of Telecommunications & Energy ("Department") issued a Notice of Probable Violation ("NOPV") to Boston Gas Company ("Respondent" or "Company"). The NOPV stated that the Respondent violated G.L. c. 82, § 40 ("Dig-Safe Law") when it failed "to adequately mark underground utilities underlying an area on Canterbury Street, Hingham." The Division, in its Informal Review Decision of August 3, 1999, found that the Company had violated the Dig-Safe Law and required the Company to pay a civil penalty of \$1,000. The Respondent appealed the Division's decision to the Department. Pursuant to 220 C.M.R. § 99.07(3), the Department conducted an evidentiary hearing concerning the Division's informal decision on October 19, 1999 and February 8, 2000.¹

Christopher J. Bourne and Angela Motley, public utilities engineers, and Richard Wallace, pipeline safety investigator, testified on behalf of the Division. James Michael Gallant, President of Mass Pavement Reclamation Inc., testified on behalf of the Company. The evidentiary record consists of twelve Division exhibits, and seven Company exhibits.

¹ The Department's Dig-Safe regulations, 220 C.M.R. § 99.00 et seq. were amended on May 14, 1999. Since this matter arose prior to the promulgation of these new regulations, the parties relied on the regulations in effect at the time of the incident (Exhs. PLN-6, BGC-3).

II. POSITIONS OF THE PARTIES

A. The Division

Pursuant to G.L. c. 82, § 40 and 220 C.M.R. § 99.00 et seq., the Division investigated the cause of an incident that occurred on the private property at 52 Canterbury Street in Hingham on November 24, 1998. As a result of its investigation, the Division determined that Boston Gas violated the Dig Safe laws by failing to mark a gas line on the private property (Exh. PLN-2; Tr. at 56, 57, 70, 107-109). In accordance with the regulations, Boston Gas appealed the Division's decision. At the adjudicatory hearing, the Division presented evidence that was accumulated during the Division's investigation.

Specifically, the Division presented evidence that the Respondent failed to locate and mark one of its underground utilities in response to a Dig-Safe request issued to Boston Gas on October 21, 1998 (Exhs. PLN-2; PLN-4; PLN-8; PLN-9; PLN-10; PLN-11). The Dig-Safe request indicated that Albanese D&S ("Albanese") was to begin an excavation on October 26, 1998, along the public and private ways of Canterbury Street in Hingham, Massachusetts, between Rockland Street and the intersection at Hull Street (Exhs. PLN-2; PLN-4; PLN-8; PLN-9; PLN-10; PLN-11; BCG-5(a)).

According to the Division, on November 24, 1998, Albanese struck a Boston Gas service line on the private property at 52 Canterbury Street resulting in a natural gas leak and explosion (Exh. PLN-2; Tr. at 56, 57, 70, 107-109). The Division stated that as a result of its investigation into the matter, it determined that although there were Dig-Safe markings elsewhere at 52 Canterbury Street indicating a service line to the house from the driveway,

there were no Boston Gas Dig-Safe markings indicating the location of the gas service line that was ruptured (Tr. at 34-37). According to the Division, this failure to mark violates G.L. c. 82, § 40.

As a result of its violation of the Dig-Safe law, the Division recommended that the Department impose a civil penalty of \$1,000 (Exhs. PLN-1; Tr. at 108).

B. The Respondent

The Respondent presented two arguments as to why Boston Gas should not be found to have violated Dig-Safe. First, the Respondent argues that the October 21, 1998 Dig-Safe ticket was not valid because Canterbury Street was graded and reclaimed after Boston Gas had marked its gas lines (Affidavit; Tr. at 99-101, 102). The Respondent contends that following this grading, reclamation, and paving, the excavator requested another Dig-Safe ticket, under which the Respondent had until November 25, 1998 to re-mark the property (Tr. at 74, 76, 78). The Respondent contends that this November ticket superseded the pre-existing October ticket, and was effective at the time of the incident on November 24, 1998 (Tr. at 77).

Second, the Respondent argues that both the October and November Dig-Safe notices were invalid because they did not specifically reference 52 Canterbury Street as the site of the excavation (Tr. at 74-75). The Respondent contends that both Dig-Safe notices referenced a half mile area between Hull and Rockland Streets, Hingham (Exhs. PLN-8; PLN-9; BCG-4; BCG-5(a)&(b); Tr. at 74-75). The Company claims that the failure to be specific violates G.L. c. 82, § 40.

III. STANDARD OF REVIEW

Pursuant to G.L. c. 82, § 40, within seventy-two hours from the time a utility company is notified by Dig-Safe Inc. of a scheduled excavation, the utility shall designate the location of its pipes, mains, wires or conduits in that location.² Using information provided by the utilities as to the location of pipes, mains, wires or conduits, minimizes the chances of serious injury or property damage as a result of the excavation. See, e.g., Boston Gas Company, D.P.U. 88-DO-30, at 7 (1990).

IV. ANALYSIS AND FINDINGS

The first issue for the Department's consideration is which Dig-Safe ticket applies: the first request, dated October 21, 1998, or the subsequent request dated November 23, 1998, after grading work was done on the length of Canterbury Street (Exhs. PLN-8; PLN-2).

The Division presented uncontradicted evidence that although Canterbury Street itself had been graded, the street work did not alter or eliminate the markings placed on the private property at 52 Canterbury Street. On the day of the incident, Albanese was excavating on the private property, not in the public street, and Albanese, therefore, was reasonable in relying on the markings that Boston Gas had placed there and that still remained visible. Since the excavation that day was not being done in the street, Boston Gas' evidence concerning the street resurfacing is irrelevant and the claim that the November notice superseded the October

² Dig-Safe, Inc. is a non-profit organization that notifies all utilities with underground facilities of proposed excavation in the area.

ticket is not correct. Accordingly, the Department finds that the Dig-Safe ticket issued on October 21, 1998 is applicable.

Next, the Department addresses whether Boston Gas accurately marked the location of its gas lines on the private property at 52 Canterbury Street pursuant to the October 21, 1998 Dig-Safe ticket. The uncontradicted evidence establishes that Boston Gas did not place accurate Dig-Safe markings identifying the location of the Company's service line leading to the house where excavation work was proposed. Boston Gas marked a line from the driveway that, in fact, was not located there and failed to mark, at all, the line in the yard fronting Canterbury Street that was struck by Albanese. Because Boston Gas did not accurately mark the gas lines on the private property at 52 Canterbury Street, the Department finds that Boston Gas violated G.L. c. 82, § 40.

With regard to Boston Gas' contention that neither ticket was valid because Albanese failed to describe adequately 52 Canterbury Street as the location where the excavation was to occur, the Department finds this argument to be without merit for two reasons. First, it is clear by the area defined in the Dig-Safe tickets that 52 Canterbury Street required a pre-mark prior to excavation. Both tickets called for work along both sides of Canterbury Street starting at Rockland Street and continuing through to the intersection at Hull Street; and as the map clearly shows this area includes 52 Canterbury Street, which has an address and frontage on Canterbury Street (Exhs. PLN-9; PLN-10; PLN-11). Second, the Company negates its own argument regarding the specificity of the Dig-Safe tickets by having marked, albeit incorrectly, a gas line leading up the common area driveway to 52 Canterbury Street. The marking of that

line is the Company's indication, as required by Dig-Safe, of where it believed the gas line was located. The Respondent's action in marking this line is a clear indication that the Company recognized that it was required to mark that area. If the Company had any legitimate questions regarding the markings to be made, those questions should have been raised by the Company at the time it needed clarification, not after the incident occurred.

The Department's Dig-Safe regulations state that "[i]n determining the amount of the civil penalty, the Department shall consider the nature, circumstances and gravity of the violation; the degree of the respondent's culpability; and the respondent's history of prior offenses." 220 C.M.R. § 99.11(2). Boston Gas' failure to mark a gas line is a serious offense. Moreover, the Department notes that the Company has had previous Dig-Safe violations. See, for example, Consent Order of March 29, 1999 (Exh. PLN-1). Because of the seriousness of Boston Gas' violation of G.L. c. 82, § 40 and its history of offenses, we find that the Respondent shall be subject to the maximum penalty of \$1,000.

V. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That Boston Gas Company violated G.L. c. 82, § 40 by failing to mark an underground utility line at 52 Canterbury Street in Hingham; and it is

FURTHER ORDERED: That Boston Gas Company shall pay a civil penalty of \$1,000 for this violation within 30 days of the date of this Order.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).